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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/555,040	11/21/2005	Susanne Emig	05-549-CIP	2756
34704 7590 04/29/2011 BACHMAN & LAPOINTE, P.C. 900 CHAPEL STREET SUITE 1201 NEW HAVEN, CT 06510			EXAMINER HELM, CARALYNNE E	
			ART UNIT 1615	PAPER NUMBER
			MAIL DATE 04/29/2011	DELIVERY MODE PAPER

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

**Advisory Action**  
**Before the Filing of an Appeal Brief**

**Application No.**

10/555,040

**Applicant(s)**

EMIG ET AL.

**Examiner**

CARALYNNE HELM

**Art Unit**

1615

**--The MAILING DATE of this communication appears on the cover sheet with the correspondence address --**

THE REPLY FILED 18 April 2011 FAILS TO PLACE THIS APPLICATION IN CONDITION FOR ALLOWANCE.

1. ☐ The reply was filed after a final rejection, but prior to or on the same day as filing a Notice of Appeal. To avoid abandonment of this application, applicant must timely file one of the following replies: (1) an amendment, affidavit, or other evidence, which places the application in condition for allowance; (2) a Notice of Appeal (with appeal fee) in compliance with 37 CFR 41.31; or (3) a Request for Continued Examination (RCE) in compliance with 37 CFR 1.114. The reply must be filed within one of the following time periods:

- a) ☐ The period for reply expires \_\_\_\_\_ months from the mailing date of the final rejection.  
b) ☐ The period for reply expires on: (1) the mailing date of this Advisory Action, or (2) the date set forth in the final rejection, whichever is later. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of the final rejection.  
Examiner Note: If box 1 is checked, check either box (a) or (b). ONLY CHECK BOX (b) WHEN THE FIRST REPLY WAS FILED WITHIN TWO MONTHS OF THE FINAL REJECTION. See MPEP 706.07(f).

Extensions of time may be obtained under 37 CFR 1.136(a). The date on which the petition under 37 CFR 1.136(a) and the appropriate extension fee have been filed is the date for purposes of determining the period of extension and the corresponding amount of the fee. The appropriate extension fee under 37 CFR 1.17(a) is calculated from: (1) the expiration date of the shortened statutory period for reply originally set in the final Office action; or (2) as set forth in (b) above, if checked. Any reply received by the Office later than three months after the mailing date of the final rejection, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**NOTICE OF APPEAL**

2. ☒ The Notice of Appeal was filed on 21 April 2011. A brief in compliance with 37 CFR 41.37 must be filed within two months of the date of filing the Notice of Appeal (37 CFR 41.37(a)), or any extension thereof (37 CFR 41.37(e)), to avoid dismissal of the appeal. Since a Notice of Appeal has been filed, any reply must be filed within the time period set forth in 37 CFR 41.37(a).

**AMENDMENTS**

3. ☒ The proposed amendment(s) filed after a final rejection, but prior to the date of filing a brief, will not be entered because  
(a) ☒ They raise new issues that would require further consideration and/or search (see NOTE below);  
(b) ☐ They raise the issue of new matter (see NOTE below);  
(c) ☒ They are not deemed to place the application in better form for appeal by materially reducing or simplifying the issues for appeal; and/or  
(d) ☐ They present additional claims without canceling a corresponding number of finally rejected claims.  
NOTE: \_\_\_\_\_. (See 37 CFR 1.116 and 41.33(a)).

4. ☐ The amendments are not in compliance with 37 CFR 1.121. See attached Notice of Non-Compliant Amendment (PTOL-324).

5. ☐ Applicant's reply has overcome the following rejection(s): \_\_\_\_\_.

6. ☐ Newly proposed or amended claim(s) \_\_\_\_\_ would be allowable if submitted in a separate, timely filed amendment canceling the non-allowable claim(s).

7. ☒ For purposes of appeal, the proposed amendment(s): a) ☒ will not be entered, or b) ☐ will be entered and an explanation of how the new or amended claims would be rejected is provided below or appended.

The status of the claim(s) is (or will be) as follows:

Claim(s) allowed: \_\_\_\_\_

Claim(s) objected to: \_\_\_\_\_

Claim(s) rejected: 44-50, 58-66, 76, 78-86 and 88-91

Claim(s) withdrawn from consideration: 51-57, 67-75, 77, 87 and 92

**AFFIDAVIT OR OTHER EVIDENCE**

8. ☐ The affidavit or other evidence filed after a final action, but before or on the date of filing a Notice of Appeal will not be entered because applicant failed to provide a showing of good and sufficient reasons why the affidavit or other evidence is necessary and was not earlier presented. See 37 CFR 1.116(e).

9. ☐ The affidavit or other evidence filed after the date of filing a Notice of Appeal, but prior to the date of filing a brief, will not be entered because the affidavit or other evidence failed to overcome all rejections under appeal and/or appellant fails to provide a showing a good and sufficient reasons why it is necessary and was not earlier presented. See 37 CFR 41.33(d)(1).

10. ☐ The affidavit or other evidence is entered. An explanation of the status of the claims after entry is below or attached.

**REQUEST FOR RECONSIDERATION/OTHER**

11. ☐ The request for reconsideration has been considered but does NOT place the application in condition for allowance because: \_\_\_\_\_

12. ☐ Note the attached information *Disclosure Statement(s)*. (PTO/SB/08) Paper No(s). \_\_\_\_\_

13. ☒ Other: See Continuation Sheet.

/Caralynne Helm/  
Examiner, Art Unit 1615

/Juliet C Switzer/  
Primary Examiner, Art Unit 1634

Continuation of 13. Other: The amendment to the claims raises new issues that would require additional grounds of rejection that were not previously necessary (e.g. claims dependant from cancelled claims). In addition, the amendment also introduces a limitation to claim 44 that lacks antecedent bases ("the cosmetic preparation") and the changes to this claim alters the scope of its dependant claims, thereby requiring further consideration.

Applicants argue that Krzysik et al. does not deal with a cosmetic preparation and is non-analogous art. While, as applicants note, Krzysik et al. is concerned with embodiments of their invention drawn to absorbent articles coated with their composition, they also teach the utility of compositions of their invention for cosmetic and skin care applications in their teaching of cosmetic articles employing the composition.

"The compositions of the invention provide several benefits associated with barrier function including protecting, strengthening, restoring and repairing the skin barrier...the compositions of the invention could also provide benefits when used in conjunction with tissue, pre-moistened wipe products and cosmetic cleansing and buffing pads." (see column 4 lines 5-9 and 14-17)

These beneficial properties conferred to the skin are due to the components of the inventive topical composition provided by Krzysik et al. Their explicit suggestion of the compositions' utility for cosmetic and skin care applications therefore make these teachings of Krzysik et al. analogous to those of Roulier et al. who teach compositions that are also for the purpose of skin care, treatment, cleansing, protection, as well as makeup.

Additionally, applicants argue that there is no teaching of fatty esters in the cited passages in the Office action. The paragraphs from which the passages originate and the referenced text recites the following:

"The compositions of the invention also include from about 5 to about 95 percent by weight of one or more solidifying agents...One or more solidifying agents can be selected from alkyl siloxanes (with a melting point greater than 35°C.), polymers, waxes (animal, vegetable or mineral), hydrogenated vegetable oils having a melting point of 35°C or greater and fatty acid esters having a melting point of 35°C or greater." (see column 5 lines 45-47 and 60-65)

"Examples of suitable solidifying agents include, but are not limited to, the following compounds:.... pentaerythrityl tetrabenenate. (see column 5 lines 66-67 and column 6 line 16)

Here fatty acid esters (termed fatty esters by Roulier et al. and in the rejection) with a melting point of 35°C or greater are taught as solidifying agents. The listing of particular varieties of these fatty acid esters includes pentaerythrityl tetrabenenate. Roulier et al. teach the inclusion of fatty esters in their topical compositions and the artisan of ordinary skill would have found it obvious to select any such compound that met the melting point requirement of Roulier et al. (a melting point greater than 65°C) and was already known to be utilized in topical compositions. The pentaerythrityl tetrabenenate taught by Krzysik et al. meets these requirements. No evidence has been presented that demonstrates an unexpected result gleaned for the selection of pentaerythrityl tetrabenenate or polyvalent esters, therefore it is considered a functional equivalent among fatty acid esters utilized in topical compositions and having a melting point greater than 65°C. Thus applicants' arguments are unpersuasive and the rejections are maintained.